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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CHARLOTTE CHARLES and)	
TIM DUNN, Individually)	
and as Co-Administrators)	Civil No. 20-1052
of the ESTATE OF HARRY)	
DUNN, and NIALL DUNN,)	
Individually,)	
)	Alexandria, Virginia
Plaintiffs,)	February 3, 2021
)	
v.)	
)	
ANNE SACOOLAS and)	
JONATHAN SACOOLAS,)	
)	
Defendants.)	
)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE T. S. ELLIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	Steven Jeffrey Toll, Esq. Agnieszka Maria Fryszman, Esq. Poorad Razavi, Esq. Leslie Mitchell Kroeger, Esq. Theodore Jon Leopold, Esq. Nicholas Jacques, Esq. Cohen Milstein Sellers & Toll PLLC (DC) 1100 New York Ave, NW Suite 500, West Tower Washington, DC 20005
For the Defendants:	John D. McGavin, Esq. Bancroft, McGavin, Horvath & Judkins, P.C. 9990 Fairfax Boulevard Suite 400 Fairfax, Virginia 22030

(Appearance page
continued)

COURT Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(3:06 P.M.)

THE COURT: You may call the next matter, please.

THE DEPUTY CLERK: The Court calls civil matter
Charlotte Charles, et al., versus Anne Sacoolas, et al. Case
Number 20-CV-1052.

May I have appearances please, first for the
plaintiff.

MR. TOLL: Good afternoon, Your Honor. For the
plaintiff, Steven Toll. I would say it is nice to see you
again, but it is nice to hear your voice again. With me is
my partner who will argue, Agnieszka Fryszman.

MS. FRYSZMAN: Good afternoon, Your Honor.

THE COURT: How do I pronounce your name,
Ms. Fryszman?

MS. FRYSZMAN: Agnieszka Fryszman.

THE COURT: So "Fryszman" is correct; is that right?

MS. FRYSZMAN: Yes, sir.

THE COURT: Thank you.

Who is on the line on behalf of the defendant?

MR. MCGAVIN: Good afternoon, Your Honor. My name is
John McGavin, and I represent both defendants.

THE COURT: All right. And you will be arguing on
behalf of the defendants?

MR. MCGAVIN: Yes, I will, Your Honor.

1 THE COURT: All right. Now, the matter is before the
2 Court on a motion for dismissal pursuant to the doctrine of
3 *forum non conveniens* and also pursuant to a number of other
4 claims. There's an 11-count complaint, some counts of which
5 the plaintiff has indicated an intention to withdraw -- I
6 think that's four of them, maybe five -- and there's a motion
7 to dismiss those.

8 In today's argument, I'm going to focus chiefly on
9 the motion for dismissal pursuant to the doctrine of
10 *forum non conveniens*, which the parties have fully briefed
11 and I think is now ripe for disposition.

12 So let me begin by giving the defendant -- that's
13 Mr. McGavin -- an opportunity. Of course, I have read your
14 briefs. In fact, I'm going to ask you a number of questions,
15 to begin with, Ms. Fryszman and Mr. McGavin. Let me start
16 just generally by asking you some questions that I'm unclear
17 about regarding the facts. All right. And let me address
18 these to Mr. McGavin.

19 Mr. McGavin, as I understand it, this case arises
20 from a tragic, unfortunate accident that occurred in the
21 United Kingdom, and it was a collision between the defendant,
22 Ms. Sacoolas' car, and the motorcycle of the decedent, a
23 head-on collision.

24 Let me ask you, Mr. McGavin, as I understand it, the
25 defendant, Ms. Sacoolas, did not remain at the scene but left

1 the scene and did not call an ambulance but later someone
2 did. The decedent, as I understand it, did not die instantly
3 but died later on.

4 Flesh out those facts for me, Mr. McGavin.

5 MR. MCGAVIN: Thank you, Your Honor. This is John
6 McGavin, as we're asked to identify ourselves.

7 Your Honor, the facts as alleged in the complaint are
8 not completely accurate about what occurred after the
9 accident. Ms. Sacoolas had her children in the vehicle, and
10 upon the occurrence of the accident, she checked on her
11 children and went to check on Mr. Dunn. And about that time
12 another motorist arrived and called 9-1-1. She did not flee
13 the scene of the accident; she stayed at the accident scene.
14 So that allegation is disputed and --

15 THE COURT: How long did she stay at the scene of the
16 accident?

17 MR. MCGAVIN: She stayed until the rescue squad was
18 there, but I could not tell you precisely how long, but the
19 suggestion that she fled is just not true.

20 THE COURT: Did she stay until the police came?

21 MR. MCGAVIN: Yes, Your Honor. She spoke to the
22 police. She told them the same thing that she has said, and
23 has accepted responsibility for the accident, and there is no
24 dispute on liability. This is a quantum-only case. So she
25 spoke to the police. She admitted that she was on the wrong

1 side of the road and, in these proceedings, maintains that
2 same position.

3 THE COURT: Why did she flee the United Kingdom?

4 MR. McGAVIN: Well, the allegations that she fled the
5 United Kingdom are a bit overstated, in our view, Your Honor.
6 She came to the United States and did not participate in the
7 criminal prosecution, and that is what has caused a great
8 deal of local interest in the UK and has gotten a great deal
9 of publicity and a great deal of interest. So her reasons --

10 THE COURT: Why did she flee the United Kingdom?

11 MR. McGAVIN: She returned to the United States after
12 some time, but she did not flee from the prosecution of those
13 charges.

14 THE COURT: I don't understand that. She did leave.
15 How soon after the accident did she return to the United
16 States?

17 MR. McGAVIN: It was within a month or so after the
18 accident, Your Honor.

19 THE COURT: Can you be more precise? Was it within
20 days?

21 MR. McGAVIN: Your Honor, my understanding is it was
22 approximately 30 days, but I don't know precisely the
23 timeline of when she did leave.

24 THE COURT: I assume you talked to your client, so
25 you're confident it is about a month?

1 MR. MCGAVIN: I am, Your Honor. That's my
2 understanding.

3 THE COURT: I don't understand why she left. Could
4 you explain that to me?

5 MR. MCGAVIN: Your Honor, I know that she was
6 consulting with counsel, and what those consultations were
7 and ultimately the decision to return to the United States I
8 do not know, and I'm not sure that -- I do not -- I cannot
9 answer that question in complete candor to the Court, Your
10 Honor.

11 What you're saying is you know the answer but you
12 can't disclose it?

13 MR. MCGAVIN: In part, Your Honor, that would be
14 true.

15 THE COURT: Well, it's puzzling.

16 Let me ask this question of Ms. Fryszman: Do you
17 know any facts of why she left the United Kingdom and when
18 she left?

19 MS. FRYSZMAN: I do not, Your Honor. I don't know
20 why she left. I do know that she told the local police that
21 she would stay and cooperate with the investigation, but she
22 did not and she, instead, returned to the United States.

23 THE COURT: Mr. McGavin, is Mrs. Sacoolas employed by
24 any department or agency of the United States?

25 MR. MCGAVIN: She has been, yes, Your Honor.

1 THE COURT: I understand she may have been in the
2 past. At the time of this accident, was she employed by any
3 department or agency of the United States?

4 MR. MCGAVIN: I believe that she was, Your Honor.

5 THE COURT: All right. Do you know what department
6 or agency of the United States?

7 MR. MCGAVIN: No, Your Honor. That has not been
8 revealed to me.

9 THE COURT: Do you know what department or agency of
10 the United States her husband was employed by?

11 MR. MCGAVIN: It is a matter that is -- the short
12 answer, Your Honor, I do not know the agency or the entity by
13 whom he is employed. That has not been provided, and I do
14 think there are some issues there of security. That's my
15 understanding.

16 THE COURT: Are you saying that Mr. and Mrs. Sacoolas
17 were employed by an intelligence agency of the United States,
18 and that's why she left?

19 MR. MCGAVIN: I think that was a significant factor,
20 certainly, especially for Mr. Sacoolas. The incident
21 occurred after they were at an Air Force base where
22 Mr. Sacoolas was working, and Ms. Sacoolas was -- had the
23 children there at the event and was driving the children
24 home.

25 THE COURT: And what did Ms. Sacoolas do for the

1 department or agency of the United States for which she was
2 then employed?

3 MR. MCGAVIN: Your Honor, I do not have details of
4 what her specific roles or duties were. I do not know that.

5 THE COURT: Are you suggesting that's a matter of
6 security, as well?

7 MR. MCGAVIN: That is what I have been led to
8 believe, Your Honor, but I do not want to overstate that.
9 And if it's something that the Court would need in his
10 determination, I would press my client for more details.

11 THE COURT: All right. Tell me again, you said it
12 was about 30 days after the accident that she left the United
13 Kingdom; is that right?

14 MR. MCGAVIN: That is my rough understanding, Your
15 Honor, yes.

16 THE COURT: I don't know where I had the impression
17 that she left fairly soon after the accident, but I guess I
18 am simply mistaken.

19 Now, your client, Mr. McGavin, she declines to return
20 to the United Kingdom; is that right?

21 MR. MCGAVIN: That's correct, Your Honor.

22 THE COURT: Why does she decline to return to the
23 United Kingdom?

24 MR. MCGAVIN: Her fear is that, with the tremendous
25 media attention, that she will not receive -- or she's

1 concerned that she will not receive fair treatment both with
2 the press and the local community. So she is fearful upon
3 the return, and concerned, and she's certainly apologetic and
4 accepts full responsibility for causing this accident and has
5 never denied it.

6 THE COURT: Yes, but accepting full responsibility
7 doesn't mean you run away; it means that you stay there and
8 face it. So I think you shouldn't overplay the "full
9 responsibility" card.

10 Now, let me ask you this: If she won't return to the
11 United Kingdom, why in the world does that make the United
12 Kingdom the right place to litigate this case under the
13 *forum non conveniens* doctrine?

14 MR. MCGAVIN: There are a number of reasons, Your
15 Honor, and they go in part to what the Court might ultimately
16 do with the nature of the plaintiffs' claims. But in the
17 claims that we anticipate will survive, there is a claim
18 under the LRA for the pain and suffering of the deceased
19 before his death. And there will be medical providers, there
20 will be EMTs, there will be the motorist who came up on the
21 scene shortly after the accident, there will be healthcare
22 professionals who would be witnesses who will be available to
23 receive process in the UK and provide that evidence. In
24 addition, Mr. Dunn, the father, has a claim in his own right
25 for having come up on the scene and found his son in distress

1 and seeing him suffer, and he makes a claim for emotional
2 distress. That's not a bereavement claim or a solace claim,
3 which is not permitted under the law of the UK, but it is a
4 claim under which severe medical -- medical or emotional --
5 mental or emotional distress can be tested by healthcare
6 professionals, and that would be in the UK.

7 In addition, Your Honor, under the Fatal Accident
8 Act, the plaintiff is claiming pecuniary loss, loss of
9 services. And as the deceased was 19 years old, emancipated,
10 he does not leave a surviving spouse or children, then for
11 the mother and father and surviving brother, the question
12 will become what pecuniary services he was providing and
13 whether that is lost income or services in kind. Those will
14 have to be fully tested as the quantum of any damages that
15 the Court will award is evaluated. So those things are
16 uniquely available, those witnesses and that evidence, the
17 school records or employment records or evidence of payment,
18 those things are uniquely within the UK, and not in the
19 United States, where obviously Mr. Dunn lived and worked and
20 went about his school activities or other things that he was
21 engaged in in the UK. So that evidence is uniquely there in
22 the UK.

23 Ms. Sacoolas doesn't add or provide much to setting
24 that quantum of damages as to what is the emotional distress
25 suffered by Mr. Dunn after his injury and his suffering until

1 he died, Mr. Tim Dunn's claim for his emotional distress, and
2 then evaluation of those pecuniary damages. So there are a
3 number of reasons why that evidence will be far easier to
4 develop, far easier to subpoena, far easier to present in the
5 UK.

6 As to public interest, there is enormous public
7 interest in this case in the UK, as evidenced by the
8 tremendous amount of media attention and the interest that
9 has gone all the way up to the Prime Minister, who has
10 expressed some interest in this case. So, obviously, there
11 is a tremendous interest there.

12 Plus, the law in the UK on this is very -- on a
13 wrongful death action of this kind -- is very different than
14 what we have in the United States. It is very nuanced. And
15 we have expert -- competing expert reports that help explain
16 it to us. But it is a very different application of the law.
17 Certainly, Your Honor can interpret it, but it is nuanced and
18 it is different, and it would be likely interpreted perhaps
19 differently than here. That's good or bad different law, it
20 doesn't preclude the case being dismissed on this motion, but
21 it certainly is an important factor in the Court exercising
22 its discretion.

23 So for these reasons --

24 THE COURT: What -- go ahead. "For these reasons,"
25 go ahead, sir.

1 MR. MCGAVIN: Thank you, Your Honor.

2 I was going to say, for these reasons, we believe
3 that the motion should be granted.

4 THE COURT: All right. Ms. Fryszman, you may respond
5 now.

6 MS. FRYSZMAN: Your Honor, no case has been cited to
7 you -- and I know of no case -- where any court has dismissed
8 on *forum non conveniens* grounds in favor of the jurisdiction
9 where the defendant has stated that they will not appear.
10 There is no precedent that I know of for such a dismissal.

11 The plaintiffs in this case filed here in the Eastern
12 District of Virginia because this was the only place where
13 they could obtain personal jurisdiction over the defendant.
14 It is the defendant's --

15 THE COURT: Ms. Fryszman, could I ask you to speak a
16 little louder, please.

17 MS. FRYSZMAN: Yes.

18 THE COURT: Go ahead.

19 MS. FRYSZMAN: There is Fourth Circuit precedent that
20 says that when a plaintiff, even a foreign plaintiff, files
21 in the defendant's home that that choice is entitled to
22 deference. To prevail, the defendants must show that this
23 forum is vexatious and oppressive and that the public and
24 private interests strongly favor transfer, and this they
25 cannot do.

1 And I will take the witness arguments first. It is
2 our view that Anne Sacoolas is a necessary and key witness.
3 She is the only witness to Harry's pain and suffering as he
4 lay on the ground after the accident during the time period
5 from when the accident occurred to the time period when the
6 first responders arrived, which in our understanding that was
7 quite a long period. So she is going to be a key witness as
8 to damages. And the Fourth Circuit, in *DiFederico v.*
9 *Marriott*, held that that was a reason to deny
10 *forum non conveniens* transfer, in that case where a key
11 damages witness couldn't go to the foreign court. So on that
12 basis alone, I think transfer is inappropriate. She would be
13 a key witness on damages, and she is also a key witness on
14 the merits.

15 One of the negligence claims is that she did not call
16 for help and did not call the police when she had a duty to
17 do so after having caused the accident. Although the
18 defendants say that they have admitted full responsibility
19 that she was driving on the wrong side of the road, they
20 haven't spoken to that part of the negligence claim. And
21 there is also the vicarious liability claim, and both Mr. And
22 Mrs. Sacoolas will be witnesses in that claim. So it is our
23 view that they will be needed at trial, and they refused to
24 appear, and the defendants have not met their burden showing
25 that a trial could go forward at all in the United Kingdom

1 when the defendants refuse to appear and refuse to testify in
2 person.

3 As to the private factor, the witnesses are really
4 the only private factor that has been raised, and that factor
5 definitely favors keeping the case in the Eastern District of
6 Virginia, where the defendants are and where they are able to
7 participate in person. The defendants haven't raised any of
8 the other private factors. So that factor (indiscernible)
9 maintaining the case in the Eastern District of Virginia.

10 As to the public factors, the defendants have raised
11 the views of the United Kingdom. The United Kingdom strongly
12 supports the suit going forward in the Eastern District of
13 Virginia. We have put in a letter from the Foreign Secretary
14 of the United Kingdom that states -- I quote Exhibit 6 -- it
15 says, "The British government takes the view that citizens
16 can bring their case in whichever court they think
17 appropriate" -- here, in the Eastern District of Virginia --
18 "and the British government has confidence in the ability of
19 this Court to hear the case and that the Foreign Secretary
20 hopes that the action will be able to proceed here." The
21 United Kingdom's interest is in the case proceeding in the
22 Eastern District of Virginia.

23 THE COURT: Why wouldn't the United Kingdom's
24 interest first and foremost be to pursue it in the United
25 Kingdom with the presence of Ms. Sacoolas if she waives her

1 immunity from civil liability?

2 MS. FRYSZMAN: Ms. Sacoolas, in their papers, they
3 have said that she refuses to return and will not return.

4 THE COURT: I understand that. But what I'm saying
5 is why isn't it in the best interests of the United Kingdom
6 to hear this matter in the United Kingdom, provided
7 Ms. Sacoolas agrees to come back? I understand she hasn't
8 agreed to come back. But I assume you and your clients would
9 prefer to have this case in the United Kingdom if
10 Ms. Sacoolas and her husband were to return and waive their
11 immunity. Isn't that right?

12 MS. FRYSZMAN: I would need to check with our
13 clients, but it is my understanding that she vehemently
14 opposes returning; that the British government, as recently
15 as this weekend, asked the Biden Administration to review the
16 decision not to extradite, and they were refused. So I think
17 that is just not in the cards, Your Honor. They have said in
18 their papers that they won't return, and the United States
19 government has said that they won't review the decision not
20 to extradite.

21 THE COURT: Are you telling me that the Biden
22 Administration refuses to change the decision of the Trump
23 Administration in this regard?

24 MS. FRYSZMAN: That is my understanding, that they're
25 not going to go back and re-review it.

1 THE COURT: All right. I just wanted that clarified;
2 that the Biden Administration agrees with the Trump
3 Administration on this point.

4 Go ahead.

5 MS. FRYSZMAN: I think what they said was they
6 wouldn't re-review it, so the decision is going to just stand
7 as it was.

8 But as to the other witnesses that defendant has
9 mentioned, we have put in affidavits from the other
10 witnesses, and they're all willing to come to the Eastern
11 District of Virginia live and in person. So this isn't a
12 case where -- you know, the defendants have put forth no
13 information and no evidence that any witness is refusing to
14 come here. So all the witnesses that we know about are
15 willing to come here live and in person in the Eastern
16 District of Virginia, and the opposite is true of the United
17 Kingdom.

18 And as to the conflict of laws, I guess I agree with
19 the defendants, it's going to be British law. We share a
20 common legal tradition. Everybody agrees that the Court is
21 well equipped and capable of applying British law. It's in
22 English, it is a lot like our law. And that Virginia also
23 has a local interest in the DiFederico case. Again, the
24 Fourth Circuit says local courts have an interest in the
25 conduct of their own citizens, particularly diplomats who are

1 representing the United States overseas (indiscernible)
2 citizens may wish to sue someone in the United Kingdom, and
3 we would want their courts to be receptive to our own
4 citizens.

5 THE COURT: All right. I'm going to recess this
6 matter briefly while I consider whether I have any questions
7 for you on the *forum non conveniens* issue, and so I will
8 leave the hearing at this time, recess it.

9 Tanya, you can shift me to the breakout room.

10 THE DEPUTY CLERK: Yes, Judge.

11 MR. MCGAVIN: Judge Ellis, I'm sorry to interrupt. I
12 do have some more information, checking my notes, that could
13 answer in a bit more detail a couple of your questions if you
14 would permit me.

15 THE COURT: Yes, of course, you go ahead.

16 MR. MCGAVIN: Thank you, sir.

17 I have clarified with one of my colleagues who is
18 assisting Ms. Sacoolas that Ms. Sacoolas was employed by the
19 State Department and that the State Department asserted
20 diplomatic immunity and re-called her. So that was a factor
21 in her leaving. I wanted to answer that question more
22 directly.

23 Secondly, Your Honor, I do want to confirm, in
24 checking my notes, that Ms. Sacoolas, immediately after the
25 accident, did go to Mr. Dunn. And as she realized he was in

1 distress, a motorist came by, she flagged that motorist down,
2 and then made the call. She did not leave until the UK
3 police released her. So she stayed until release by the
4 police. So those --

5 THE COURT: Didn't she assure the police that she
6 would be there and available to investigate the matter in the
7 future?

8 MR. MCGAVIN: She did, and she also spoke to the
9 police in a subsequent meeting and did admit, as before. But
10 as I say, it was the U.S. that asserted the diplomatic
11 immunity, and they re-called her.

12 THE COURT: Who re-called her?

13 MR. MCGAVIN: The State Department.

14 THE COURT: Did she work for the State Department or
15 some other agency?

16 MR. MCGAVIN: My understanding from my colleague, in
17 checking these notes, Your Honor, is that she worked for the
18 State Department, and that is also from information that she
19 has provided.

20 THE COURT: So you're telling me that she was a State
21 Department employee, and that's not a cover job or anything
22 like that?

23 MR. MCGAVIN: I don't know that, and I do not want to
24 mislead the Court in any way on that. I would have to find
25 out, to answer that correctly.

1 THE COURT: But she's not, as I understand it, a
2 foreign service officer.

3 MR. McGAVIN: She is waiving diplomatic immunity,
4 Your Honor, as evidenced by her affidavit.

5 THE COURT: She is waiving her diplomatic immunity?

6 MR. McGAVIN: Yes. That's in her affidavit.

7 THE COURT: And so if she went back -- what she is
8 not waiving is her immunity from civil and criminal
9 prosecution in the United Kingdom; is that right?

10 MR. McGAVIN: Not civil, Your Honor. As I take what
11 you mean, the consequences of a civil proceeding, meaning
12 that this lawsuit, she is not -- she is -- she is consenting
13 to service and accepting service of a civil action in the UK.
14 But she is not returning for purposes of the criminal
15 proceedings, no.

16 THE COURT: All right. Anything else you want to
17 tell me, Mr. McGavin?

18 MR. McGAVIN: No. Thank you, Your Honor. Thank you
19 for allowing me to provide that additional information.

20 THE COURT: I may have additional questions.

21 Remove me to the breakout session, Tanya.

22 THE DEPUTY CLERK: Yes, Judge.

23 (Recess taken)

24 THE COURT: All right. I have a few more questions,
25 if I may.

1 Mr. McGavin, I've looked a little more carefully.
2 Your statement that she remained in the UK for 30 days is off
3 by a factor of about 2. I think it is 18 days, from what I
4 can tell, and it may be sooner. I don't know.

5 MR. MCGAVIN: I'm sorry, Your Honor. This is John
6 McGavin. I have checked on that, and I'm corrected. I'm
7 told it was about 3 weeks. I wanted to fact check myself
8 during our recess, and that's the information that I have.

9 THE COURT: 18 days.

10 MR. MCGAVIN: It could be 18. I was -- I thought it
11 was a bit more, as much as 3 weeks, but I'm not going to
12 argue that point, Your Honor.

13 THE COURT: All right. And let me ask, also,
14 Mr. McGavin: I have an understanding -- imperfect, to be
15 sure -- that Ms. Sacoolas and one of the children was in the
16 car that struck the decedent. Mr. Sacoolas and the other
17 child were in another automobile somewhere up ahead. Is that
18 your understanding?

19 MR. MCGAVIN: I did not understand that to be true,
20 but I don't know, and I don't want to misstate that record.
21 She definitely had one of --

22 THE COURT: You could --

23 MR. MCGAVIN: I'm sorry?

24 THE COURT: -- how far ahead Mr. Sacoolas was of
25 Ms. Sacoolas and whether he stopped for the accident?

1 MR. MCGAVIN: I do not believe that Mr. Sacoolas was
2 at the scene of the accident, Your Honor. What I
3 understand --

4 THE COURT: I'm saying you couldn't tell me how far
5 ahead he was, if he was ahead, and whether he stopped; all
6 you can tell me is your information is he wasn't at any time
7 at the scene?

8 MR. MCGAVIN: That's correct, Your Honor.

9 THE COURT: All right. Do you have any information
10 on that, Ms. Fryszman?

11 MS. FRYSZMAN: I do not, Your Honor. I only have
12 what we've pled in the complaint.

13 THE COURT: Are you aware, Ms. Fryszman, that there's
14 some indication that he was driving up ahead of her -- I
15 don't know -- it could have been miles ahead, it could have
16 been 10 feet ahead -- with the other child?

17 MS. FRYSZMAN: I read a wide range of newspaper
18 stories, and I just -- I don't know what the facts actually
19 are, Your Honor.

20 THE COURT: All right. Back to the
21 *forum non conveniens* issue for just a moment. I understand
22 that she concedes that she was negligent. Of course, if the
23 matter remains here, she would be deposed, and I take it she
24 could be deposed here even if the matter were sent back to
25 the United Kingdom; isn't that right?

1 MR. MCGAVIN: This is John McGavin, Your Honor. I
2 think that is right.

3 MS. FRYSZMAN: I believe that's right, but if there
4 were to be a trial, the plaintiffs, of course, would like to
5 put her on live, as we would want all the witnesses to be
6 live.

7 THE COURT: Well, of course, you can issue a subpoena
8 if it's here and she will appear live.

9 MS. FRYSZMAN: Yes.

10 THE COURT: Let's see, I had another question.

11 I understand, Mr. McGavin, you argued that all of
12 those witnesses who were at the scene of the accident and
13 could testify about the pain and suffering that the decedent
14 suffered following the accident, that they're all in England.
15 What do you say to the fact that it appears that those
16 witnesses have been identified and have all declared their
17 willingness to travel to the United States for this case?

18 MR. MCGAVIN: Your Honor, there's a key witness here
19 that is not identified in the materials by either side, who
20 is the female motorist that Ms. Sacoalas flagged down within
21 a very short time, no more than a minute or two is my
22 understanding, after the incident, because she went to aid
23 Mr. Dunn and could see that he was in great distress. She
24 had a child or two in the car -- I'm not sure of that -- and
25 then flagged down this motorist. And she was in great shock

1 and upset and felt terrible, and the motorist is the one who
2 made the call. That motorist is a very important witness to
3 dispel some of these statements that are made, and I do not
4 have her name, and she is not -- I know that she is not
5 listed in the affidavits that have been submitted by the
6 plaintiffs, Your Honor. That is a very important witness to
7 dispel --

8 THE COURT: Well, if you don't know her name, how do
9 you know it isn't one of the witnesses that are in the
10 affidavits?

11 MR. MCGAVIN: Because it is a female, Your Honor,
12 it's a layperson, and what they have identified is an EMT,
13 along with the family. So this is a lay witness female.

14 THE COURT: What's her name?

15 MR. MCGAVIN: I don't know her name, Your Honor.

16 THE COURT: Did you ask Mrs. Sacoolas?

17 MR. MCGAVIN: In my information from Ms. Sacoolas, I
18 have not secured her name or I don't have her name.

19 THE COURT: Well, you just told me about a witness
20 you think would be very favorable to your side, but you can't
21 tell me the name of that witness. Does that strike you as
22 odd?

23 MR. MCGAVIN: I think it is something that I should
24 know and, unfortunately, I do not. I hope it's not odd, but
25 I wish I was able to quote that to you, Your Honor.

1 THE COURT: Well, it is odd. You told me there's a
2 witness who can dispute some of the things that the plaintiff
3 is alleging, but you can't tell me who that witness is. So
4 what you're saying is that is an important witness and the
5 plaintiff has not shown that that witness would come to the
6 United States.

7 MR. McGAVIN: Yes.

8 THE COURT: So I don't even know if that witness
9 would be available in England if no one knows that witness'
10 name.

11 MR. McGAVIN: Ms. Sacoolas does not know her name.
12 In looking at my notes, I see that she does not know the name
13 of it, and it is not in the information that I have obtained
14 from her.

15 THE COURT: Well, then, how in the world does that
16 matter here if nobody knows her name? She won't appear in
17 England, either.

18 MR. McGAVIN: I understand that it is in and part of
19 the police investigation of this matter.

20 THE COURT: All right. So when the police find out
21 the identity of this person, then we can ascertain whether
22 that person would be willing to come to the United States if
23 the case remains here.

24 MR. McGAVIN: That's correct, obviously, yes.

25 THE COURT: All right. You indicated, also, I think,

1 Ms. Fryszman, that the UK has indicated support for plaintiff
2 bringing the case in the United States. You don't mean to
3 suggest that the UK is opposed to having the matter fully
4 litigated in the United Kingdom, with all of the interested
5 parties there, including the defendants?

6 MS. FRYSZMAN: No, I'm saying that the private
7 factors, one of which is the interest of the locality, all
8 favor the Eastern District of Virginia. And the defendants
9 cannot --

10 THE COURT: That's a public factor.

11 MS. FRYSZMAN: Sorry. I misspoke, Your Honor. It's
12 a public factor, yes. The defendants can't show that the
13 public strongly favors transfer because the United Kingdom
14 has indicated that they support maintaining the suit here in
15 the Eastern District. So all of the other factors favor the
16 Eastern District of Virginia, and they would have to strongly
17 favor the United Kingdom in order for transfer to be
18 appropriate.

19 If I might add, as to the anonymous and missing
20 witness, the caselaw is a hundred percent clear that the
21 defendants would have to come forward with evidence of a
22 witness as noncumulative testimony and an affidavit saying
23 that he or she would not come here. They haven't done that.
24 They have not met their burden on that mystery witness.

25 THE COURT: All right. And the argument about the

1 application of American law -- or English law, rather -- not
2 American law -- let me be clear about that -- it is not
3 surprising or unusual for a Federal Court in Virginia to
4 interpret the law of other states which may be different from
5 the law of Virginia, as the law of the United Kingdom is from
6 Virginia law. And that's not a problem. That's what judges
7 do. And then they fashion appropriate applicable
8 instructions. Now, the jury is unfamiliar with both American
9 and English law, so I don't know that it makes any difference
10 there.

11 Mr. McGavin, tell me why you think the application of
12 English law militates in favor of a dismissal on
13 *forum non conveniens* grounds given what I just said.

14 MR. MCGAVIN: I have no doubt, Your Honor, that you
15 can interpret and read the materials and understand the law.
16 But it is so summarily different in terms of how it is
17 interpreted in the UK. For example, Your Honor, in the
18 United States, insurance companies issue policies of
19 insurance that have limits, \$50,000, \$100,000 policies. The
20 insurance policies in the UK, that is a foreign concept for
21 them. They don't have limits, and part of that is because of
22 how these tragedies are interpreted under their law and how
23 they narrowly construe bereavement laws and solace and these
24 issues of what's a dependency or a pecuniary loss. So it is
25 quite narrow and quite restricted. And it is a very

1 different application, which although --

2 THE COURT: Isn't that what you say I'm competent to
3 understand and to instruct the jury on?

4 MR. McGAVIN: To a point, Your Honor. It's one thing
5 for the scholars to read the law; it's another to actually,
6 as I say in the world of trial work, make the sausage, so to
7 speak, to actually see how it is applied. And it is a little
8 different. And that's why I think that the expert statements
9 that we've submitted from Mr. Palmer, which outline the very
10 limited interpretations that are applicable under UK law, are
11 very foreign to us in a wrongful death action where we have
12 the concepts of bereavement and solace and loss of kindly
13 offices, those elements that are unique to at least Virginia
14 statutory scheme for wrongful death awards.

15 THE COURT: What is it you think I can't understand
16 as a judge about that?

17 MR. McGAVIN: I think what will be hard for the Court
18 is to understand just how restrictive the awards are and how
19 narrow their interpretations of the --

20 THE COURT: Well, I might not agree with it, but that
21 doesn't mean I can't understand it and apply it. Whether I
22 agree with English law or not is totally irrelevant,
23 completely irrelevant. Any reason why you think I can't
24 understand it and apply it?

25 MR. McGAVIN: Well, I know you can understand it.

1 THE COURT: Of course I can. It's in English; isn't
2 it? And the opinions are in English.

3 MR. McGAVIN: They are in the King's English, yes,
4 Your Honor.

5 THE COURT: All right. And actually I have some
6 experience in legal education in England. Of course, any
7 American judge can understand it and apply it, and the jury
8 doesn't know any different, whether they would be in England
9 or the United States. They have to listen to what a judge
10 says and apply it. I'm not moved much by that, I can tell
11 you that. I think that yes, it's unfamiliar, but it's in
12 English, the cases are in English. I can understand it, and
13 I'm bound by it, and I will apply it in instructions. But I
14 don't think it's an important factor. I think it is
15 appropriate for you to raise it as a factor, but I don't
16 think it is a decisive one. The private factors I think you
17 all have told me about.

18 Is there anything more about the private factors that
19 you want to add, Mr. McGavin? And then I will ask you,
20 Ms. Fryszman.

21 MR. McGAVIN: Yes, Your Honor. The police
22 investigation, which will include the name of this witness,
23 who, as I get information from one of my colleagues by
24 e-mail, is Jennifer Hewett (phonetic), is this witness' name,
25 but I don't have an address or contact information for her.

1 But that police investigation, that information will be
2 important to us, and that of course will be something that is
3 subject to far easier a subpoena in the UK and obtaining that
4 information in the UK than it will be in the U.S. So I would
5 add that additional information in trying to give the Court
6 full answers to the questions that you've asked.

7 THE COURT: You really think so? Do you know about
8 depositions in the United Kingdom, Mr. McGavin?

9 MR. MCGAVIN: No, Your Honor. I'm not a -- I'm not
10 a -- I'm not.

11 THE COURT: I'm an old man, Mr. McGavin, and I go
12 back a long ways. Many years ago, before I was a judge, I
13 was a lawyer litigating antitrust cases in Europe, including
14 the United Kingdom. It's totally irrelevant to what's before
15 me today. But I tried to take the deposition of people in
16 France and Switzerland, and I almost got put in jail for
17 trying that. Taking depositions in Europe is far different
18 from taking depositions here.

19 But anyway, we shall see. I will consider what you
20 have said.

21 How about public factors?

22 Well, let me ask Ms. Fryszman, do you have anything
23 more on private factors?

24 MS. FRYSZMAN: Only that they have only raised the
25 issue of witnesses, they have not raised any of the other

1 private factors. As to this witness, no one has put in
2 anything before Your Honor to indicates that this witness
3 wouldn't be willing to come here and wouldn't be willing to
4 (indiscernible).

5 THE COURT: Well, perhaps you now have the name of
6 that witness. I don't know what other information you're
7 getting by e-mail, Mr. McGavin. If you have more that you
8 want to tell me, by all means do so, or else the person who
9 is giving you that information can produce himself or
10 herself, and I will hear from them if they're counsel for the
11 defendants.

12 But you have the name of that person, Ms. Fryszman,
13 and now you can pursue that.

14 Now, let's go to the private factors. Mr. McGavin,
15 do you have anything more to tell me about the private
16 factors?

17 MR. MCGAVIN: I'm checking my notes, Your Honor.
18 Thank you.

19 I think I have discussed the local interest, which I
20 think is quite strong, obviously, in the UK as evidence by
21 the attachments that have been submitted on behalf of the
22 plaintiff. There seems to be an extraordinary local interest
23 in having this matter litigated and decided. And the
24 attachment from -- or the letter suggesting there is no
25 opposition to this going forward in the U.S. is not quite the

1 same as saying that the British government has endorsed this
2 case being taken by this Court to be decided. I think they
3 defer, Your Honor, to your sound judgment.

4 As to court congestion, obviously the Eastern
5 District of Virginia will move expeditiously. That's not an
6 issue. But we also understand that, in the UK, because of
7 their procedures where they go into ADR, as this is a
8 damages-only case, it is our understanding from Mr. Palmer,
9 who provided our expert report, that would move
10 expeditiously. So there is no difference so much there.

11 And I mentioned, of course, the Court not being
12 completely at home with this law. No other public interest
13 issues I can -- I believe that are applicable or will impact
14 on the Court's decision other than those I have already
15 cited.

16 Thank you.

17 THE COURT: Refresh my recollection, if you would,
18 please. Is Mr. Palmer a barrister, solicitor, or academic?

19 MR. MCGAVIN: All right. I believe he is a
20 barrister. I'm checking. I believe that's right. I think
21 he is not only -- yes, he is a barrister of the English Bar
22 and Queen's Counsel, called to the bar in 1977.

23 THE COURT: All right. Thank you. All right.

24 Anything more on public factors, Ms. Fryszman?

25 MS. FRYSZMAN: Yes, Your Honor. I just wanted to

1 reiterate that the closing line of the letter from the
2 British Foreign Secretary is, "I hope, therefore, your action
3 in the United States is able to proceed." It's not quite as
4 neutral as Mr. McGavin would have you believe. It is clearly
5 a statement of support for the parents and for the action to
6 proceed in the Eastern District of Virginia (indiscernible).

7 As to the barrister, one of the issues that the
8 barrister -- the defendant's expert did not address at all --

9 THE COURT: I'm sorry. Say that again. I can't hear
10 you, Ms. Fryszman.

11 MS. FRYSZMAN: One of the issues that the barrister
12 for the defendants did not address at all is whether the case
13 can, in fact, go forward remotely. Our expert, who is also a
14 barrister, said that British courts don't go forward
15 remotely, and the defendants would need to be present. And
16 as you know, the defendants are refusing to return to the
17 United Kingdom for trial or for any proceedings. And it is
18 the view of our barrister that the court wouldn't proceed in
19 that manner. So the defendants haven't, in fact, shown that
20 it is an available or adequate forum because they didn't put
21 in any evidence that the Court could, in fact, proceed if the
22 defendants don't turn up in the United Kingdom.

23 THE COURT: All right. I'm going to go into a
24 breakout session one last time, and then I will return and
25 tell you how I intend to proceed.

1 Tanya, could you remove me to a breakout session,
2 please.

3 THE DEPUTY CLERK: Yes, Judge.

4 (Recess taken)

5 THE COURT: All right. Ms. Fryszman, Mr. McGavin,
6 thank you for your arguments. They were helpful, and your
7 briefs, as well, and I will review them thoroughly. I'm
8 going to decide this issue promptly and not go on today to
9 the other issues, but I will schedule a hearing for the other
10 issues on the possibility that I will deny the motion for
11 *forum non conveniens*, and then I will hear these matters.
12 But I'm going to decide the motion to dismiss on
13 *forum non conveniens* grounds first, and then I will proceed
14 on February the 17th, at 3 p.m., in the event that I deny the
15 motion to dismiss on *forum non conveniens* grounds, and on
16 that date, I will hear argument on the remaining issues on
17 the motion to dismiss.

18 All right. I thank counsel again for your arguments.

19 I will point out one thing. I think it was
20 Mr. McGavin who said this. Mr. McGavin, you said something
21 about the King's English. You're wrong. It is the Queen's
22 English.

23 MR. MCGAVIN: Your Honor, I'm wondering if during
24 your service in the -- I think it was the Navy -- if you were
25 stationed over there and learned some of that English. I

1 don't know.

2 THE COURT: No, I was stationed on aircraft carriers,
3 not on the ground. But my time in England was as a student
4 and, later on, in a sabbatical, and so my view is it's the
5 Queen's English, and long may she reign.

6 MR. MCGAVIN: Well, thank you, Your Honor. If my
7 wife, who is quite a lover of the PBS British shows, hears
8 that I made that mistake, I'm sure she will equally point out
9 to me that I was incorrect.

10 THE COURT: All right. I thank counsel for your
11 cooperation and your arguments. They were, indeed, helpful.

12 It is an important issue. All issues are important
13 to the parties that are making them, and I remind myself
14 every time of that, and I will give it careful consideration
15 and issue a decision in advance of the February date that I
16 have set for further arguments. And at that time, depending
17 on the decision I make on the *forum non conveniens* motion,
18 that further argument will need to be canceled or will
19 proceed.

20 Any questions, Ms. Fryszman?

21 MS. FRYSZMAN: No, Your Honor.

22 THE COURT: Mr. McGavin?

23 MR. MCGAVIN: Just confirming the date, Your Honor.
24 I was trying to write it down quickly. Did you say
25 February 17, at 3 p.m.?

1 THE COURT: Yes, sir.

2 MR. MCGAVIN: Thank you. Nothing else. Thank you,
3 Your Honor.

4 THE COURT: I thank counsel again. The court stands
5 in recess.

6 (Proceedings adjourned at 4:11 p.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller

February 5, 2021

PATRICIA A. KANESHIRO-MILLER

DATE